

3. Defendant is not in violation of this Honorable Court's November 2, 2004 Order (Order), has not actually failed to comply with said Order, and is not contemptuous thereof. *See N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir. 1984). *See also Affidavit of Defendant attached hereto and incorporated herein.* Defendant timely acted to comply with the Order, incurring great strain, cost and duress to comply with said Order by, for example, removing relevant web materials. *Id.*
4. Defendant has acted in good faith at all relevant times, and neither deliberately nor unjustifiably disobeyed the Order. *See Star Fin. Servs., Inc. v. AASTAR Mortgage Corp.*, 89 F.3d 5, 13 (1st Cir. 1996). In fact, the Affidavit in support of Plaintiffs' Motion identifies an alleged publishing of "source codes" that are already part of the public domain as an Exhibit of Defendant filed in the instant matter; additionally, said source codes are not viewable to the general public, are not violative of the instant Order, and are now nonexistent. *Id.*; *See also Affidavit of Defendant attached hereto and incorporated herein.*
5. Said Order may be unclear and ambiguous because it is difficult for Defendant to be "able to ascertain from the four corners of the order precisely what acts are forbidden." *Gilday v. Dubois*, 124 F.3d 277, 282 (1st Cir. 1997) (*citation omitted*). *See, e.g., United States v. Anderson*, 921 F.2d 335, 337-38 (1st Cir. 1990).
6. Additionally, said Order may be impossible to fully comply with. *Morales-Feliciano v. Parole Bd. of P.R.*, 887 F.2d 1, 5 (1st Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990). In the instant matter, for example, Plaintiffs accuse Defendant

of controlling and operating web materials in violation of said Order but in reality Defendant has no dominion, control or other authority over same. *See Plaintiffs' Affidavit, point # 7; See also Affidavit of Defendant attached hereto and incorporated herein.*

7. Judicial sanctions are not appropriate in the instant matter because Defendant has complied with said Order, and because Plaintiffs have not incurred any sustained losses for which compensation is due. *See United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947); *see also Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976).

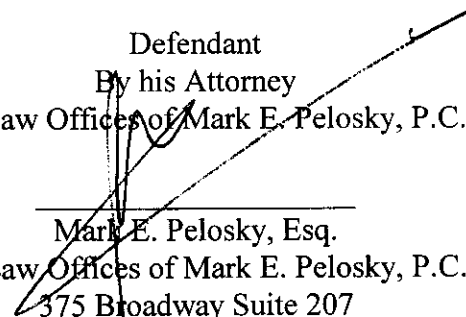
8. Defendant's request for attorneys' fees and costs is inappropriate and unreasonable, particularly in light of the questionable evidence and unreasonable relationship to the actual losses allegedly incurred by the Defendants. *United Mine Workers*, 330 U.S. at 304. For example, **Defendant** has prior to and during the instant litigation attempted verbally and in writing to negotiate, arbitrate or mediate the instant dispute and even requested same through this Honorable Court, **not the Plaintiffs**. Moreover, nowhere in Plaintiffs' Motion is there any mention of or proof of their purported "losses." Finally, Plaintiffs' "attorneys fees and costs incurred in this matter has [not] been reasonable and necessary," *See Motion*. Plaintiffs ignored Defendant's verbal and written requests to resolve this matter prior to suit, then ignored the written request of Defendant's counsel to do same, and then filed suit; surely this Honorable Court cannot accept such actions as "reasonable and necessary." *Id.*; *See also Affidavit of Defendant attached*

hereto and incorporated herein. The aforementioned and other, however, do support Defendant's instant claim for reasonable attorney's fees and expenses to oppose Plaintiffs' instant Motion.

9. Plaintiffs continue to abuse process to harass, intimidate, damage, injure, and otherwise harm Defendant by, for example, threatening his family, filing the instant action around this holiday season, and other. *See also Affidavit of Defendant attached hereto and incorporated herein.* This Court should not and cannot be used for such improper, inappropriate, illegal, and abusive conduct.

WHEREFORE Defendant respectfully requests this Honorable Court denies Plaintiffs' Motion, awards reasonable attorney's fees and costs to Defendant's Attorney, and orders any other relief deemed mete and just.

Respectfully submitted,

Defendant
By his Attorney
The Law Offices of Mark E. Pelosky, P.C.


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December 21, 2004

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

CIVIL ACTION NO. 04 11539 JLT

**WALTER STICKLE, ANTHONY
CALIENDO, JOHN PITINGOLO, and
DANIEL FISHER,
Plaintiffs**

v.

**ARTHUR ORFANOS,
Defendant**

AFFIDVIT / CERTIFICATE OF SERVICE

I, Mark E. Pelosky, Esq., of The Law Offices of Mark E. Pelosky, P.C., attorney for Defendant hereby depose under oath I have this day caused the following:

**DEFENDANT'S OBJECTION TO AND OPPOSITION TO PLAINTIFF'S MOTION
SEEKING ORDER OF CONTEMPT**

DEFENDANT'S REQUEST FOR HEARING FOR ORAL ARGUMENT

AFFIDVAIT / CERTIFICATE OF SERVICE

To be served upon Plaintiff's Counsel Michael B Newman, Clark Hunt and Embry, 55 Cambridge Parkway, Cambridge, MA 02142 by first class mail, postage prepaid.

Subscribed and sworn to under the pains and penalties of perjury on this 21 day of December, 2004.

Mark E. Pelosky, Esq.
The Law Offices of Mark E. Pelosky, P.C.

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REGARDING

Strickle et al. v. Defenses

Docket No. 0411539 JLT

FROM

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